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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF NEW JERSEY,

Petitioner,

vs.

EDWARD RYAN,

Respondent.

On Writ of Certiorari to the New Jersey Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether the Double Jeopardy Clause of the Fifth Amendment precludes an increase in a custodial sentence after the original sentence has been partially executed?

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Opinions Below

The opinion of the New Jersey Supreme Court, captioned *State* v. *Ryan*, —— *N.J.* ——, —— *A.* 2d —— (1981), appears in the Appendix (A1, *et seq.*). The opinion of the Superior Court of New Jersey, Appellate Division, similarly captioned, appears in 171 *N.J. Super.* 427, 409 *A.* 2d 821 (App. Div. 1979) and in the Appendix. (A 28 *et seq.*).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* Section 1257(3). The opinion of the New Jersey Superior Court, Appellate Division affirming respondent's sentence was rendered on December 4, 1979. (A 25). On April 20, 1981, the New Jersey Supreme Court reversed the Appellate Division holding that the enhancement of respondent's custodial term of 3 to 5 years to 5 to 7 years following a violation of probation violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The alleged constitutional infirmity was premised solely upon the fact that the original sentence had been partially executed. (A 1). On May 20, 1981, the New Jersey Supreme Court granted petitioner's timely motion for a stay pending disposition of the instant petition. (A 40).

Constitution, Statutes and Rules Involved

United States Constitution

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, with-

out due process of law; nor shall private property be taken for public use, without just compensation.

New Jersey Statute—Title 2A

N.J.S.A. 2A:168-4. Termination or extension of probation; violation of conditions; arrest and detention; sentence; powers of judge other than trial judge

Upon a report from the chief probation officer that the probationer has complied with the conditions of probation and that the best interests of the public and the probationer will be subserved thereby or for other good cause, the court may, at any time, discharge a person from probation, or may extend the probation period within the limits of the maximum period provided by section 2A:168-1 of this title.

At any time during the probation period the court may issue a warrant and cause the probationer to be arrested for violating any of the conditions of his probation, or any probation officer, police officer, or other officer with power of arrest, upon the request of the chief probation officer, may arrest the probationer without a warrant; and a commitment by such probation officer setting forth that the probationer has, in his judgment, violated the conditions of his probation shall be sufficient warrant for the detention of such probationer in the County jail, house of detention or local prison, when designated in the commitment, until he can be brought before the court. Such probation officer shall forthwith report such arrest or detention to the court

and submit to the court a report showing the manner in which the probationer has violated his probation. Thereupon the court, after summary hearing, may continue or revoke the probation and the suspension of sentence, and may cause the sentence imposed to be executed or impose any sentence which might originally have been imposed.

New Jersey Statute—Title 2C

N.J.S.A. 2C:45-3 Summons or Arrest of Defendant Under Suspended Sentence or on Probation; Commitment Without Bail; Revocation and Resentence.

* * *

b. When the court revokes a suspension or probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted.

New Jersey Rules of Court

R. 3:21-10(b): Reduction or Change of Sentence

* * *

(b) Exceptions. A motion may be filed and an order may be entered at any time (1) changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse, or (2) amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant or (3) changing a sentence for good cause shown upon the joint application of the defendant and prosecuting attorney, or (4) changing a sentence as authorized by the Code of Criminal Justice.

Statement of the Case

This is a petition for writ of *certiorari* to review a final decision rendered by the New Jersey Supreme Court. That court reversed a judgment of the New Jersey Superior Court, Appellate Division, and held that the Double Jeopardy Clause of the United States Constitution precludes the imposition of an increased sentence after a violation of probation when the original custodial sentence has been partially executed. The opinion of the court was written by Justice Robert L. Clifford and was joined by five other justices. Justice Sidney M. Schreiber dissented on the ground that this Court's opinion in *United States* v. *DiFrancesco*, 449 *U.S.* ——, 66 *L. Ed.* 2d 328 (1980) strongly supports the proposition that a defendant's original custodial sentence term may be increased upon violation of probation regardless of the fact that the original custodial term was partially executed. Justice Schreiber similarly noted that a defendant should not have any expectation of finality in a sentence which has been suspended subsequent to the partial service of a custodial term.

Respondent's appeal of his sentence evolved from two indictments returned by the Grand Jury of Monmouth County, New Jersey on August 2, 1973. Specifically, Indictment No. 1388-72 charged respondent with two counts of breaking and entering with intent to steal in violation of *N.J.S.A.* 2A:94-1 and two counts of larceny in violation of *N.J.S.A.* 2A:119-2. Indictment No. 1389-72 charged respondent with two counts of breaking and entering with intent to steal in violation of *N.J.S.A.* 2A:94-1 and larceny contrary to the provisions of *N.J.S.A.* 2A:119-2.

On November 13, 1973, Accusation No. A-253-73 charged respondent with two counts of breaking and entering with intent to steal in violation of *N.J.S.A.* 2A:94-1. Finally,

Municipal Complaint No. W-598011 (Misc. No. 3568) charged respondent with the disorderly persons offense of stealing. That same day, respondent entered *retraxit* pleas of guilty to all of the above charges.

On January 4, 1974, respondent was sentenced by the trial court to an aggregate term of three to five years in State Prison. Respondent was re-sentenced on January 4, 1974 by the trial court to the Monmouth County Correctional Institution for a six month term concurrent to the State Prison term on the disorderly persons offense.

Pursuant to *N.J. Ct. R.* 3:21-10, (Reduction or change of sentence) respondent's sentences were again changed on July 2, 1974. Respondent received a suspended term of incarceration and was transferred to a drug treatment program. He was also placed on two years probation. The order made effective August 1, 1974, required respondent to abide by the rules and regulations of the treatment facility and the Probation Department. *N.J.S.A.* 2A:168-2 and *N.J.Ct.R.* 3:21-7

On February 14, 1977, respondent was cited for violation of probation in that: (1) On November 24, 1975, he was convicted in municipal court of the disorderly persons offense of growing marijuana; (2) he absconded from probation supervision and was missing since January 5, 1976; and (3) he changed his place of residence and left New Jersey for more than 24 hours, both without permission of his probation officer. (T2-8 to 16).[1]

At the violation of probation hearing on February 18, 1977, respondent pled guilty to absconding from the super-

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[1] "T" refers to probation violation hearing on February 18, 1977.

"2T" refers to sentencing on February 25, 1977.

"PSR" refers to pre-sentence report.

vision of the probation department and leaving the State without permission (T3-19 to 4-5). The hearing was then adjourned for one week. (T28-3 to 21).

By February 25, 1977, the date of the second hearing, the court had received new information that seven detainers had been lodged against respondent. (2T2-17 to 18). In fact, respondent was then serving 30 days for malicious damage and larceny (2T18-19), and had just pled guilty to a contempt of court charge for which he had been given a 30 day sentence. (2T3-4 to 8). The court thereafter sentenced respondent to an aggregate term of five to seven years in State Prison. This sentence represented an increase of two years over the previous custodial sentence. (2T10-16 to 11-24). Respondent was given credit for 219 days spent in custody. Finally, respondent was again sentenced on the municipal complaint to six months in the Monmouth County Correctional Institution to run concurrently with the State Prison terms.

On April 6, 1977, respondent filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. In his brief, respondent raised several issues including the alleged unconstitutionality of an increased custodial sentence after partial execution of the original term. Respondent also contended that if *N.J.S.A.* 2A:168-4 permitted an increased sentence after the original sentence has been partially satisfied, then it violated the Double Jeopardy Clause of the United States Constitution.

On December 4, 1979, the New Jersey Superior Court, Appellate Division, upheld the increased sentence given respondent. The court determined that where a prison term was partially served when the balance of the term was suspended and respondent was placed on probation, double jeopardy concepts do not preclude the imposition of a new and greater sentence in place of the suspended sentence

when respondent violates conditions of his probation. *State* v. *Ryan*, 171 *N.J. Super.* 427, 409 *A.* 2d 821 (App. Div. 1979) (A 25 *et seq.*).

Respondent petitioned for certification in the New Jersey Supreme Court. That petition was granted on February 11, 1980. 82 *N.J.* 297, 412 *A.* 2d 802 (1980). In its supplemental brief to the New Jersey Supreme Court, respondent contended that double jeopardy considerations made it impermissible to apply N.J.S.A. 2A:168-4 to an offender after service of his state prison term has begun. In its reply brief, petitioner argued that the imposition of an increased sentence after execution of the original sentence does not violate the principles of double jeopardy.

On April 20, 1981, the New Jersey Supreme Court reversed the decision of the Appellate Division, vacated the increased term of five to seven years and reinstated the original sentence of three to five years. The New Jersey Supreme Court held that double jeopardy considerations militate against increasing a defendant's prison sentence after violation of probation when he has already served a portion of that custodial term. The court distinguished *United States* v. *DiFrancesco*, 449 *U.S.* , 66 *L.Ed.* 2d 328 (1980) as not addressing the issue of partial execution of sentence as raised by respondent. The New Jersey Supreme Court further distinguished *DiFrancesco* by noting that, unlike the defendant in *DiFrancesco*, respondent here had no reason to expect that his sentence was not final at the time it was imposed and his imprisonment began.

In a dissenting opinion, Justice Sidney Schreiber found that application of the facts and holding of *DiFrancesco* to the factual pattern of the instant matter indicated the absence of a double jeopardy obstacle. Justice Schreiber argued that the pronouncement of sentence has never car-

ried the finality that attaches to a judgment of acquittal, particularly where the State legislature has removed any expectation of finality by providing for an increased term of imprisonment following a violation of probation.

On May 4, 1981, petitioner moved in the New Jersey Supreme Court for a stay of judgment pending the filing of a petition for *certiorari* to this Court. On May 18, 1981, petitioner informed the New Jersey Supreme Court of this Court's recent decision in *Bullington* v. *Missouri*, —— *U.S.* ——, 29 *Cr. L. Rptr.* 2023 (May 4, 1981), as further support of its motion for a stay. On May 20, 1981, petitioner's motion for a stay pending determination of its petition for *certiorari* to this Court was granted. (A 40).

Petitioner now petitions this Court for a writ of *certiorari* to review the decision of the New Jersey Supreme Court.

REASONS FOR GRANTING THE WRIT

POINT I

The Double Jeopardy Clause of the Fifth Amendment does not prevent the imposition of an increased term of imprisonment after partial execution of the original sentence.

The decision of the New Jersey Supreme Court that the Double Jeopardy Clause of the Constitution precludes the imposition of any increased sentence after violation of probation when the original sentence has been partially executed is not consistent with the Constitution and conflicts with two recent decisions of this Court. The decisions in *United States* v. *DiFrancesco*, 499 *U.S.* ——, 66

L.Ed. 2d 328 (1980) and *Bullington* v. *Missouri*, —— *U.S.* ——, 49 *U.S.L.W.* 4481 (1981) indicate that there is no constitutional barrier to increasing a sentence after initial imposition. This Court has also approved and found no constitutional prohibition in instances where the original sentence has been increased after partial execution of that sentence. *North Carolina* v. *Pearce*, 395 *U.S.* 711 (1969). Prior to addressing the central issue regarding the constitutionality of increasing a partially executed sentence, a brief review of the relevant New Jersey statutes and precedent is in order.

A. Non-finality of sentence in cases involving revocation of probation.

The New Jersey State Legislature has provided in *N.J.S.A.* 2A:168-4 and its successor statute, *N.J.S.A.* 2C:45-3(b) (effective September 1, 1979), that following a revocation of probation or suspended sentence, the court may impose any sentence which might originally have been imposed for the underlying offense. Under *N.J.S.A.* 2A:168-4 a court would typically impose a custodial term, *e.g.* 3 to 5 years, suspend it and place the defendant on probation for a specified period. When probation is revoked in such cases the above cited statutes clearly empowered a sentencing court to impose an increased sentence, *e.g.* 5 to 7 years, which would then be served by the defendant. New Jersey courts have consistently upheld the propriety of such an increase in the face of constitutional challenges. *In re White*, 18 *N.J.* 449, 454 114 *A.* 2d 261 (1955); *State* v. *Cunningham*, 143 *N.J. Super.* 415, 417, 363 *A.* 2d 371 (App. Div. 1976); *State* v. *Pallitto*, 107 *N.J. Super.* 96, 100, 257 *A.* 2d 121 (App. Div. 1969), certif. den. 55 *N.J.* 309, 261 *A.* 2d 354 (1970); *State* v. *Driesse*, 95 *N.J. Super.* 491, 494, 231 *A.* 2d 835 (App. Div. 1967).

The underlying philosophy which removes this practice from the limitations of the Fifth Amendment Double Jeopardy Clause[2] was initially set forth in the dissenting opinion of Mr. Justice Frankfurter in *Roberts* v. *United States*, 320 *U.S.* 264, 274 (1943) and cited with approval in *In re White, supra*, 18 *N.J.* at 455, 114 *A.* 2d at 264-265:

> To treat the pronouncement of a term sentence as a kind of bargain whereby the probationer knows, no matter what, he cannot be put in prison beyond the term so named is to give a wholly unreal interpretation to the procedure. We certainly should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the philosophy of probation.

From the above, it is obvious that Mr. Justice Frankfurter was alluding to the non-finality of a sentence, particularly where it has been suspended and a probationary term is imposed pursuant to a statutory scheme. Similarly, this Court has reaffirmed that a criminal sentence, once pronounced, does not have to be accorded the constitutional finality and conclusiveness as that which attaches to a jury's verdict of acquittal, *United States* v. *DiFrancesco, supra*, 499 *U.S.* , 66 *L. Ed.* 2d at 343. Although this doctrine was recently narrowed in *Bullington* v. *Missouri, supra*, —— *U.S.* ——, 49 *U.S.L.W.* 4481, the sentence hearing there resembled a trial on the issue of guilt or innocence in which the prosecution was required

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[2] As made applicable to the States through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 *U.S.* 784, 794 (1969).

to prove additional facts in order to justify a particular sentence. In that situation, where the imposition of a particular sentence can be regarded as an "acquittal" of any more severe sentence that could have been imposed, the protection afforded by the Double Jeopardy Clause is available to a defendant. *Bullington* v. *Missouri, supra,* —— *U.S.* at , 49 *U.S.L.W.* at 4483. Absent the above sentencing process,[3] which is not present in the instant matter, it seems beyond cavil that the Double Jeopardy Clause does not apply equally to sentencing as it does to determinations of guilt or innocence. *Chaffin* v. *Stynchcombe,* 412 *U.S.* 17, 24 (1973); *North Carolina* v. *Pearce, supra,* 395 *U.S.* at 720; *Stroud* v. *United States,* 251 *U.S.* 15 (1919); *United States* v. *DiFrancesco, supra,* 449 *U.S.* at , 66 *L.Ed.* 2d at 343.

B. Partial execution of a sentence is not a constitutional bar to an increased sentence upon revocation of probation.

The focal point of this petition and the New Jersey Supreme Court opinion is whether partial execution of a custodial sentence precludes an increase of that sentence. In determining this question in the affirmative, the New Jersey Supreme Court relied solely on the Fifth Amendment of the United States Constitution:

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[3] Even though in *DiFrancesco* like *Bullington,* the prosecution was required to prove additional facts at a separate procedure to sentence defendant as a "dangerous special offender," it was not a *de novo* proceeding. Also, the burden of proof in *DeFrancesco* was merely a preponderance of the evidence with the choices of punishment being far greater. For these reasons, the *Bullington* Court distinguished *DiFrancesco* as being inapposite to their concerns. *Id.* at —— *U.S.* ——, 49 *U. S. L. W.* at 4484.

> [S]imply stated the contention [here] is that jeopardy attached as soon as defendant commenced serving his prison term, hence principles of double jeopardy foreclosed the imposition of any increased term after violation of probation. We agree. *State* v. *Ryan*, —— *N.J.* ——, ——, —— *A.*2d ——, ——, 1981. (A11a).

In an attempt to distinguish *State* v. *DiFrancesco, supra,* from the instant matter, the New Jersey Supreme Court determined that the issue raised by respondent, *i.e.* whether double jeopardy considerations militate against increasing respondent's prison sentence after violation of probation when he has already served a portion of the custodial term, was specifically left open by the *DiFrancesco* court. The New Jersey Supreme Court obviously felt the crucial difference was the partial execution of respondent's original sentence and relied on a quote from Justice Blackmun:

> [O]ur Double Jeopardy clause was drafted with the common law protections in mind. This accounts for the established practice in the federal courts that the *sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not begun to serve that sentence.*

United States v. *DiFrancesco, supra,* —— *U.S.* at ——, 66 *L. Ed.* 2d at 344 (citations omitted) (emphasis added). In his dissent, Justice Schreiber of the New Jersey Supreme Court noted that the above quotation only referred to situations in which the sentencing judge recalls a defendant who is not on bail to correct an erroneous sentence.

More importantly, it does appear that the majority in *DiFrancesco did* discuss the execution of a sentence with regard to the Double Jeopardy Clause. The language of the Court indicates that the two decisions traditionally cited in support of the proposition that jeopardy attaches at the beginning of execution of sentence thereby barring any increase of sentence, *United States* v. *Benz*, 282 *U.S.* 304, 307 (1931) and *Ex parte Lange*, 85 *U.S.* 163, 174 (1874), do not, in fact, stand for that proposition. *United States* v. *DiFrancesco, supra*, 449 *U.S.* at ——, 66 *L. Ed.* 2d at 347. Justice Blackmun noted that in *Lange* the statute involved authorized imprisonment up to one year *or* a fine. Thus, no double jeopardy problem would have existed if the statute had provided punishment of both fine and imprisonment. For these reasons, the majority determined that "the holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange's* specific context." *Id.* As one commentator has observed, the decisions applying the dictum of *Benz* did not consider whether statutory provisions postponing sentence finality also postponed sentence jeopardy. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 *J. Crim. L. and Criminology*, 19, 32 (1978).

Despite the clear pronouncements from this Court and itself in *In re White, supra*, as to the non-finality of sentence, the New Jersey Supreme Court determined that here respondent "had no reasons to expect that his original sentence was not final at the time it was imposed and his imprisonment began." (A 13). Not only is such a finding contrary to the philosophies of probation set forth in *Roberts* v. *United States, supra*, it is directly contrary to the clear intent of the New Jersey Legislature.[4] As observed

[4] Although not expressly doing so, the opinion of the New Jersey Supreme Court appears to render any increased term imposed pursuant to *N.J.S.A.* 2A:168-4 or 2C:45-3(b) unconstitutional, at least where there has been a partial execution.

by Mr. Justice Oliphant in *In re White, supra* 18 *N.J.* at 454, 114 *A.* 2d at 264:

> [B]y what more plain or strong language could the [N.J.] Legislature express its intention that the judge should be authorized to revoke the original sentence, the suspension thereof and the probation and impose any sentence which could be statutorily given for the crime committed?

This contravention of the legislative intent is important because

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishment, imposition of such sentences does not violate the Constitution.

Abernaz v. *United States*, —— *U.S.* ——, 67 *L.Ed.* 2d 275, 285 (1981). Clearly, Mr. Justice Schreiber was correct in asserting that the multiple punishment feature of the Double Jeopardy Clause only prevents the subjection of a defendant to punishment in excess of that prescribed by the legislature.

Therefore, in light of the New Jersey Supreme Court finding that respondent had no reason to expect that this original sentence was not final, the following is appropriate:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Con-

gress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

United States v. *DiFrancesco, supra,* 449 *U.S.* at , 66 *L.Ed.* 2d at 347. [citations omitted] Here, the New Jersey Legislature has specifically provided in its probation statutes that, upon revocation of probation, the sentencing court may impose any sentence which might originally have been imposed. Respondent should not therefore assert claims of double jeopardy when, having voluntarily agreed to the conditions of probation (*N.J.Ct.R.* 3:21-7), he violated those terms and is resentenced in accordance with the statutory scheme for such a violation. Under these circumstances there can be no expectation of finality in the original sentence.

Another aspect of this discussion of the increase of a partially executed sentence is the "waiver" argument of *North Carolina* v. *Pearce, supra.* In *Pearce,* this Court permitted an increased sentence after partial execution of the initial sentence. However, the New Jersey Supreme Court attempted to distinguish *Pearce.* That court felt that the principle derived from *North Carolina* v. *Pearce, supra,* 395 *U.S.* at 723-26 that a more severe sentence upon reconviction is permitted when justified by defendant's subsequent conduct, absent any motive of retaliation, was not applicable to this situation because the original conviction here had not been nullified and the "slate wiped clean." *Id.* at 321; (A18-19). Justice Clifford argued that respondent's use of N.J.Ct.R. 3:21-10[5] to modify his sentence re-

[5] Petitioner submits that the procedural background of this matter is not a bar to the resolution of the main issue before this Court,

(Footnote continued on following page)

sulted only in a suspension of his original sentence pending successful completion of the drug rehabilitation program and probationary term, not in a vacation or annulment of his sentence. The sentence was only temporarily inoperative. (A 19).

Petitioner submits that the dissent below correctly notes that if respondent had been incarcerated pending trial, convicted, given a suspended custodial sentence, and placed on probation, an increased sentence would not be barred by the principles of double jeopardy. *In re White, supra.* Similarly, any incarceration prior to subsequent granting of a new trial which resulted in an increased sentence would pose no constitutional problem. *North Carolina* v. *Pearce, supra.*[6] "If in these circumstances the sentencing slate is wiped clean, why it is not equally so where the defendant has violated his probation which had been granted at his request after commencement of his incarceration?" (A 26).

Petitioner stresses, however, that it is *not* saying that respondent has waived his double jeopardy rights by pursuing the original modification of his sentence. This Court

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(Footnote continued from preceding page)

i.e., the propriety of an increased sentence after partial execution of the original. As in *F. R. Crim. P.* 35, a motion for a modification or reduction of sentence pursuant to *N.J.Ct.R.* 3:21-10 can not result in an increased sentence. However, the increase here was a result of respondent's subsequent violation of probation. (*N.J.S.A.* 2A:168-4).

[6] Note that if any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial. *United States* v. *DiFrancesco, supra,* 449 *U.S.* at , 66 *L. Ed.* 2d. at 344-345. See discussion of finality above.

has rejected the idea that through an appeal, a defendant waives his double jeopardy protections. *Green* v. *United States*, 355 *U.S.* 184, 191-92 (1957). However, it has also been recognized that the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice. *United States* v. *Scott*, 437 *U.S.* 82, 99 (1978). A convicted person should not be allowed by his own act to avoid the jeopardy in which he stands and then assert it as a bar to subsequent jeopardy. *Murphy* v. *Massachusetts*, 177 *U.S.* 155, 161 (1900). Here the increased sentence given respondent simply reflected his non-amenability to reform, which, as the New Jersey Supreme Court concedes, "is an appropriate concern at the time of sentencing after reconviction." (A 18). Again, the New Jersey Supreme Court has misinterpreted a decision of this Court (*Pearce*)[7] and incorrectly applied the Double Jeopardy Clause.

C. Impact on government's right to appeal

The decision of the New Jersey Supreme Court is significant not only to cases involving probation, but also to the ability of the government to appeal excessively lenient sentences. The New Jersey Supreme Court determined that jeopardy attaches once a defendant has commenced serving his prison term. Such a bold assertion (whether correct or not) has a substantial impact on the availability of government appellate review of lenient sentences. If the New Jersey precedent is allowed to stand, then sen-

[7] While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as here, a new sentence following a violation of probation, that difference is no more than a "conceptual nicety." *United States* v. *DeFrancesco*, *supra*, 449 *U.S.* at , 66 *L. Ed.* 2d at 345.

tencing courts would have their sentences isolated from appellate review (*N.J.S.A.* 2C:44-7), by immediate commencement of execution[8] of a sentence or by the court denying the government's motion for stay of execution. With jeopardy having attached upon execution, the State would be precluded from appealing an excessively lenient sentence. Thus, while not specifically addressing the issue, the New Jersey Supreme Court has seemingly foreclosed government appeals of lenient sentences in many cases. Such a result would not be in keeping with State and Federal statutes permitting such review.

[8] *N.J.S.A.* 2C:44-1f(2) states a sentence shall not become final for 10 days to permit an appeal by the prosecution where a non-custodial or probationary term is imposed for a first or second degree offense. *N.J.Ct.R.* 2:9-4(d) states a sentence may be stayed upon application of the State. Such a stay is not mandatory, however, and the failure to obtain a stay would eliminate the State's statutory appeal rights.

CONCLUSION

This Court should grant this petition for *certiorari* because the New Jersey Supreme Court has incorrectly decided an important question of federal law (whether the Double Jeopardy Clause of the Fifth Amendment applies to a partially executed sentence) which requires resolution by this Court, particularly as the decision below directly conflicts with applicable decisions of this Court. See R. 17.1(c).

Respectfully submitted,

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Deputy Attorney General,
On the Petition.

APPENDIX A

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

A-15 September Term 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD JOSEPH RYAN,

Defendant-Appellant.

Argued October 7, 1980—Decided April 20,1981

On certification to the Superior Court, Appellate Division, whose opinion is reported at 171 N.J.Super. 427 (1979).

Gerald P. Boswell, Assistant Deputy Public Defender, argued the cause for appellant (*Stanley C. Van Ness*, Public Defender attorney; *Susan Slovak*, Assistant Deputy Public Defender, of counsel and on the briefs).

Rocky L. Peterson, Deputy Attorney General, argued the cause for respondent (*John J. Degnan*, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by CLIFFORD, J.

Appendix A

Defendant was sentenced to a custodial term on his criminal convictions. He served part of that term, after which the sentence was suspended and he was placed on probation. When defendant violated the terms of his probation, the trial court sentenced him to a custodial term exceeding that originally imposed for the underlying offense. On appeal defendant challenged that sentence on double jeopardy grounds. The Appellate Division affirmed the sentence, *State* v. *Ryan,* 171 N.J.Super. 427 (1979). We granted certification, 82 N.J. 297 (1980), to review that determination as well as the Appellate Division's decisions denying sentence credit for time spent on probation and interpreting the impact of N.J.S.A. 2A:168-4 on R. 3:21-10(b) proceedings.

I

In January 1974 defendant, Edward Joseph Ryan, pleaded guitly to charges of larceny and breaking and entry with intent to steal. He was sentenced to concurrent terms of three to five years in New Jersey State Prison. After serving approximately six months in custody defendant moved for sentence modification under that provision of R. 3:21-10(b) permitting "entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse * * *." The original sentencing court granted the motion effective August 1, 1974. It transferred defendant to Patrick House, a narcotic treatment facility of Jersey City Medical Center and placed him on probation for two years.[1]

[1] So much of the transcript on the motion hearing as has been furnished to us contains no warning by the court to defendant

(Footnote continued on following page)

Appendix A

In February 1977 Ryan was cited for violating the conditions of his probation. He pleaded guilty to absconding from probationary supervision and leaving the state without permission. It further developed at a hearing on those charges that seven detainers had been lodged against defendant; the State of New York was attempting to extradite him; he was serving thirty days on a conviction for malicious damage and larceny; and he was facing additional punishment for a contempt of court conviction.

Confronted with this supplemental information the trial court revoked both the probation and the suspension of the original three to five year sentence, and sentenced defendant to concurrent terms of five to seven years, the statutory maximum for the underlying offenses. On appeal to the Appellate Division defendant challenged that sentence as violating his double jeopardy rights on the ground that his original sentence was impermissibly increased after having been partially executed. Ryan further claimed entitlement to sentence credit for the time he had spent in the program prior to reincarceration. In addition, he contested the trial court's power to invoke the provision of N.J.S.A. 2A:168-4 allowing imposition of a

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(Footnote continued from preceding page)

concerning the consequences of probation violation. Ryan signed a standard form of the probation department, informing him that "[i]f you fail to observe the conditions of your probation you may be returned to court and required to serve *your sentence* in an institution" (emphasis supplied). No mention was made of the possibility of any increase in the term that had previously been imposed. Henceforth, in similar circumstances the court should spell out in unmistakable terms precisely what penalties may await a defendant who does not adhere to the conditions of his probation. See also *R.* 3:21-7.

custodial term after revocation of probation, claiming that the statute is inapplicable in the context of R. 3:21-10(b) sentence modifications.

In rejecting these contentions the Appellate Division relied on the language of N.J.S.A. 2A:168-4 authorizing "the imposition of any sentence that could have been imposed for the underlying crime after probation violation has occurred." 171 N.J.Super. at 434. Hence the court below approved the sentence of five to seven years after probation violation, even though the original sentence had aggregated three to five years and had been partially served. For its conclusion it relied heavily on *State* v. *Cunningham*, 142 N.J.Super. 415 (AppDiv. 1976), which in similar circumstances upheld the imposition of a higher sentence after violation of probation. 171 N.J.Super. at 432.

In disposing of defendant's contention that he was entitled to sentence credit for time spent on probation, the Appellate Division stressed the substantive differences between a probationer's condition of relative freedom of movement and a custodial prisoner's confinement. It concluded that the statutory scheme and prevailing case law recognize those differences in declining to equate probation and prison time. *Id.* at 441-43. See *State* v. *Smeen*, 147 N.J.Super. 229, 233-34 (App.Div.), certif. den., 74 N.J. 263 (1977). See also *Hall* v. *Bostic*, 529 F.2d 990, 991 (4th Cir. 1975), *cert. den.*, 425 U.S. 594, 48 L.Ed.2d 199 (1976) ("There is nothing unusual in the denial * * * of credit for probation or parole time against a prison sentence. It is common to both state and federal probation and parole systems. The validity of such denial has been universally recognized both in federal and state decisions" (footnote omitted).) However, in denying sentence credit for probation time, the court below did so without prejudice to de-

fendant's right to move in the trial court for credit limited to the time he had spent at Patrick House, inasmuch as the record was uninformative as to "the extent to which defendant's liberty had been restrained during the two months or so he had spent there." 171 N.J.Super. at 442.

Finally, the Appellate Division refused to adopt defendant's position that the provision of N.J.S.A. 2A:168-4, which empowers the trial court, after revocation of probation, to "impose any sentence which might ordinarily have been imposed" does not apply to probationary terms meted out in connection with R. 3:21-10(b) modifications. The court held that the application of the statute to such probation terms was manifestly in keeping with the legislative mandate, N.J.S.A. 2A:168-1 and N.J.S.A. 2A:164-17, as well as the case law on the subject. See, *e.g.*, *State* v. *Johnson*, 133 N.J.Super. 457 (App.Div. 1975).

On these latter two issues, namely, the disallowance of sentence credit for time spent on probation, at least under the circumstances of this case, and the applicability of N.J.S.A. 2A:168-4 to modification of sentence proceedings under R. 3:21-10(b), we are in accord with the Appellate Division's disposition and generally adopt its reasoning.[2] Our opinion in *State* v. *Williams*, 81 N.J. 498 (1980), filed

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[2] Our discussion of the applicability of *N.J.S.A.* 2A:168-4 to *R.* 3:21-10(b) proceedings would not be different had this case arisen under the parallel provision of the New Jersey Code of Criminal Justice, generally effective September 1, 1979. *N.J.S.A.* 2C:45-3(b) in its amended form reads as follows:

> When the court revokes a suspension or probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted.

after the Appellate Division decision in this case was handed down, is scant support for defendant's sentence credit argument. The underpinning of the credit allowance for time spent on probation in *Williams* was the evident unfairness of denying credit inasmuch as uninterrupted service of defendant's sentence was rendered impossible only through the trial court's error in granting probation. 81 N.J. at 500. See also *State* v. *Braeunig*, 135 N.J.Super. 89, 94 (Law Div. 1975), *mod. on other grounds*, 140 N.J. Super. 245 (App.Div. 1976).

However, because we disagree with the Appellate Division's resolution of defendant's double jeopardy argument, we reverse the judgment below and reinstate the original three-to-five year aggregate custodial sentence.[3]

II

Prior to the adoption of the Code of Criminal Justice, resort to the sentencing provision of N.J.S.A. 2A:168-4 was more frequently found in situations in which, on conviction of the underlying offense, the court had either suspended the imposition of *any* sentence or had imposed sentence and immediately suspended the execution thereof

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[3] Even though defendant was paroled prior to the time his appeal was heard in the Appellate Division, the question of appropriate sentence following violation of probation is not moot. The duration of his parole is limited by "the term specified in the original sentence." *N.J.S.A.* 30:4-123.65. Should defendant's parole be revoked and he be recommitted, "the term of further imprisonment upon such recommitment * * * shall not exceed the original sentence determined from the date of conviction." *N.J.S.A.* 2C:43-9(b).

and had placed the defendant on probation.[4] When defendant thereafter violated probation, a number of options were open to the trial court under the statute: it might continue the probation or revoke both the probation and the suspension of any sentence previously imposed; following any such revocation it might require a defendant to serve the sentence originally imposed or it might impose any sentence that could have been meted out originally on conviction of the underlying offense.[5]

The case law recognizing the applicability of N.J.S.A. 2A:168-4 in the stated circumstances is clear. See *In re White*, 18 N.J. 499 (1955); *State* v. *Driesse*, 95 N.J. Super. 491 (App.Div.1967); *State* v. *Zachowski*, 53 N.J. Super. 321 (App.Div.1959). Although the statements of principle justifying the imposition of a custodial sentence after probation revocation under N.J.S.A. 2A:168-4 have not been entirely consistent, *compare State* v. *Wall*, 127 N.J.Super. 594, 596 (App.Div.1976), *and State* v. *Pallitto*,

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[4] Under the Code of Criminal Justice it is no longer necessary for the sentencing court to impose and suspend the execution of a sentence before placing a defendant on probation. Rather, the Legislature now treats probation as a sentence in and of itself, hence the statutory reference to a court that "sentences [an offender] to be placed on probation." *N.J.S.A.* 2C:45-1(a). Furthermore, probation is properly viewed as a conditional sentence in that the defendant remains subject to a prison term for failure to comply with the conditions imposed by the court. See *N.J.S.A.* 2C:45-3 (a)(4) and ABA Standards, Probation §1.1(b) and Commentary (Approved Draft, 1970).

[5] For a discussion of the philosophy of probation and its role in our criminal jurisprudence one may profitably consult Justice Jacobs' opinion for the court in *Adamo* v. *McCorkle*, 13 *N.J.* 561, 563-67 (1953).

Appendix A

107 N.J.Super. 96, 100 (App.Div.1969), certif. den., 55 N.J. 309 (1970), *with State* v. *Pascal,* 133 N.J.L. 528, 532-33 (Sup.Ct.1946), *aff'd,* 1 N.J. 261 (1949), the sentence imposed after revocation of probation should be viewed as focusing on the original offense rather than on the violation of probation as a separate offense. This is borne out by the statute's limitation on the sentence that follows a violation of probation to the sentence already imposed or one that might originally have been imposed, thereby anchoring the proceedings to the original offense. The custodial term allowed by the statute is imposed *because* of the defendant's failure to abide by the conditions of his probation but is not *for* the violation of those conditions. A respected text offers this exposition of the situation in which a defendant's entire original sentence was suspended:

> In the event the Court finds that the defendant has violated the terms of his probation, the Court may either continue or revoke the original probation and the suspension of sentence. In the event the Court chooses to revoke the original probation, it may then cause the original suspension of sentence to be executed or it may impose any sentence, including the maximum, which might originally have been imposed. Imposing the maximum sentence for the original offense after revocation of probation without grand jury indictment or trial by jury is not unconstitutional, since the new sentence is only a sanction for defendant's original offense for which he had been properly tried.
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> [R. Knowlton & D. Coburn, *New Jersey Criminal Practice,* §24:11 (footnotes omitted).]

Appendix A

That the imposition of a custodial term after revocation of probation does not violate a defendant's double jeopardy rights is beyond question in view of the Supreme Court's recent flat statement to that effect in *United States* v. *DiFrancesco*, —— U.S. ——, ——, 66 L.Ed.2d 328, 346 (1980): "[T]here is no double jeopardy protection against revocation of probation and the imposition of imprisonment." But that does not answer the question squarely presented here, not addressed by the New Jersey authorities cited above, and apparently left open by the Supreme Court in *DiFrancesco, supra,* namely, whether double jeopardy considerations militate against *increasing* the defendant's prison sentence after violation of probation *when he has already served a portion of that custodial term.*[6] That feature of the case is central to Ryan's position. Simply stated the contention is that jeopardy attached as soon as defendant commenced serving his prison term, hence principles of double jeopardy foreclosed the imposition of any increased term after violation of probation. We agree.

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[6] In *DiFrancesco* the Supreme Court, after reviewing the common law double jeopardy principles, pointed out:

> [O]ur Double Jeopardy clause was drafted with the common law protections in mind. This accounts for the established practice in the federal courts that *the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence.*
>
> [*United States* v. *DiFrancesco, supra,* —— *U.S.* at ——, 66 *L.Ed.* 2d at 344 (citations omitted) (emphasis added).]

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III

Out of respect for our dissenting colleague's view that "application of the reasoning and doctrine in *DiFrancesco* to the factual pattern of the instant case indicates an absence of a double jeopardy obstacle," *post* at (slip opinion at 4), we first address that contention directly.

The Supreme Court in DiFrancesco upheld 18 U.S.C. §3576, which authorizes the prosecutor to appeal the imposition of sentence on a defendant who qualified as a "dangerous special offender." It ruled that such an appeal does not violate the Double Jeopardy protection against double punishment. *DiFrancesco,* U.S. at , 66 L. Ed. 2d at 347. That case is distinguishable from the present one.

The issue in *DiFrancesco* was stated in this fashion: "[o]ur task is to determine whether a criminal sentence, *once pronounced,* is to be accorded constitutional finality and conclusiveness similar to that which attached to a jury's verdict of acquittal." *Id.* at , 66 L.Ed.2d at 343 (emphasis added). The instant case is concerned with whether a criminal sentence is entitled to finality once the defendant *has begun to serve it.* Our holding is that in the latter circumstances, jeopardy attaches once the defendant has commenced serving his prison term.

The distinction between this case and *DiFrancesco* is further highlighted by the expectation analysis offered in the latter case. Since the defendant in *DiFrancesco* had been tried as a dangerous special offender under 18 U.S.C. §§ 3575 and 3576, the Supreme Court noted that he had no legitimate expectation of finality in his original sentence.

The statute gave him notice of the possible appeal. *Id.* at , 66 L.Ed.2d at 347. In the case now before us the defendant had no reason to expect that his original sentence was not final at the time it was imposed and his imprisonment began. When he subsequently moved for sentence modification under R. 3:21-10(b), the defendant was seeking special, more lenient treatment subject to certain conditions. Thus, the defendant was on notice that a "breach of those conditions may result in revocation of the beneficial treatment", but, given the finality of his original sentence, he would expect "at the very worse [that] the original sentence may be reinstated." *Id.* at , 66 L.Ed.2d at 353 (Brennan, J., dissenting).

It is unmistakably clear that the Supreme Court, in *DiFrancesco,* did not intend to overrule the long-standing principle that one of the purposes of the guarantee against double jeopardy is to protect a criminal defendant against the imposition of more than one punishment for a single offense. *Id.* at , 66 L.Ed.2d at 346-47. See *Whalen* v. *United States,* 445 U.S. 684, , 63 L.Ed.2d 715, 721 (1980); *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 23 L.Ed2d 656, 664-65 (1969). In that connection this Court has recognized that jeopardy attaches as soon as execution of the sentence commences. *State* v. *Laird,* 25 N.J. 298, 306-07 (1957). We have likewise acknowledged the principle that once a sentence has gone into operation, "serious double jeopardy problems" would arise if the trial judge were permitted to increase that sentence. *State* v. *Matlack,* 49 N.J. 491, 501 (1967); see *State* v. *Vaccaro,* 150 N.J.Super. 410, 413 (App.Div. 1977). Those problems are squarely presented here.

The Appellate Division looked to *State* v. *Cunningham, supra,* for authority in upholding the imposition of the in-

creased sentence in this case. It sought support as well from *North Carolina* v. *Pearce, supra,* for its analogy to cases where a conviction is reversed on appeal, the original sentence vacated, and a more severe penalty imposed following retrial. Finally, in affirming the longer prison term imposed on Ryan the Appellate Division rejected defendant's argument that his resentencing should be governed by the provisions of N.J.S.A. 2A:164-16, covering split sentences to county institutions. The court found this case controlled by N.J.S.A. 2A:164-17, requiring all except life sentences to be for a maximum and minimum term. 171 N.J.Super. at 438. This last point need not detain us as we are in accord with the Appellate Division's view of it.

State v. *Cunningham, supra,* cannot be distinguished in any significant respect from the case before us. In *Cunningham* defendant was convicted of possession of a controlled dangerous substance and sentenced to a prison term of two to three years. After serving some four months of the term he sought sentence reconsideration under R. 3:21-10. In granting the application the trial court suspended execution of the unserved balance of the prison sentence and placed defendant on probation for three years, with a special condition that he enter and successfully complete a specified drug rehabilitation program. Defendant violated his probation by leaving the program without consent of the staff, whereupon the court revoked his probation and sentenced him to three to four years in prison pursuant to N.J.S.A. 2A:168-4. Defendant's motion for post-conviction relief was denied and the Appellate Division affirmed, holding that the imposition of the longer prison sentence did not violate defendant's double jeopardy rights.

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Cunningham is based on two propositions, neither of which is persuasive. First, even though double jeopardy attaches when execution of a sentence commences, the increased term after violation of probation "is imposed for violation of probation, caused by defendant's subsequent act, and is not a second or additional punishment for the original crime," 143 N.J.Super. at 417. We have rejected this notion, *supra* at (slip opinion 9-10). Second, *Cunningham* warns that "a contrary ruling * * * would undoubtedly have a chilling effect on the sentencing judge's willingness to reconsider a sentence and place a defendant on probation, with or without special conditions." *Id.* at 418. We do not share this apprehension.

To be sure, whenever a sentencing judge must decide whether to permit an inmate to leave the prison walls for entry into a drug rehabilitation program, the decision poses a risk. The same risk is inherent in suspending the imposition of any sentence or in sentencing the offender to probation pursuant to N.J.S.A. 2C:45-1. But the sentencing discretion can be exercised in the case of a particular offender who has served a portion of his custodial term as well as it can in the case of one who has violated the terms accompanying his suspension or probation. We acknowledge the absence of perfect symmetry between the first situation, in which the defendant can be returned to confinement only for the balance of his previously imposed sentence, and the second, where the defendant faces the maximum term that could be imposed for the offense of which he was convicted. These are appropriate matters for consideration by the court faced with a motion for

modification of sentence under R. 3:21-10.[7] If, under the circumstances of this case and *Cunningham,* the court's exercise of discretion is "chilled" by the prospect that a probation violator will be exposed to no more than the unserved balance of his term—a prospect we deem unlikely —that is simply the price of vindication of a defendant's right not to be put in double jeopardy. As our discussion indicates, we disapprove of *State* v. *Cunningham, supra,* and that case may no longer be considered as acceptable authority.

Finally, we address the State's contention, adopted by the Appellate Division, that when a defendant by his own motion has his original sentence set aside, the constitutional guarantee against double jeopardy does not restrict the imposition of whatever sentence may be legally authorized, even though it may be greater than the original sentence imposed. On the strength of *North Carolina* v. *Pearce, supra,* the court below attempted to apply to the instant matter the principle derived from that case that a more severe sentence upon *reconviction* is permitted when justified by defendant's subsequent conduct, absent any motive of retaliation for the taking of an appeal. See *Pearce, supra,* 395 U.S. at 723-26, 23 L.Ed.2d at 668-70. Proceeding by way of analogy the Appellate Division concluded that "a sentence imposed after probation has been violated can reflect the added basis for evaluating defendant's amenability to reform, namely, his response to probation." 171 N.J.Super. at 436.

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[7] For example, one might reasonably expect that the experience of a defendant who has spent some time behind bars and had a taste of prison life might provide a greater deterrent to violation of probation.

There can be no doubt that defendant's subsequent conduct is an appropriate concern at the time of sentencing after reconviction. But the linchpin of *Pearce*'s analysis is the premise that

> the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. * * * [S]o far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served.
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> [395 U.S. at 721, 23 L.Ed.2d at 667 (emphasis in original).]

Here, Ryan has not attacked his original conviction. His R. 3:21-10(b) motion sought only a modification of sentence, not a new trial. The granting of that motion resulted only in a suspension of the execution of his original sentence pending successful completion of the drug rehabilitation program and probationary term, not in a vacation or annullment of that sentence. In effect the sentence became temporarily and conditionally inoperative. Under the circumstances there was no impairment of the jeopardy that attached at the execution of the sentence. The slate was not "wiped clean" within the meaning of *Pearce*.

IV

The sentence imposed following defendant's violation of probation is vacated and the original sentence aggregating three to five years is reinstated. The judgment of the Appellate Division is:

Reversed.

Appendix A

Chief Justice Wilentz and Justices Sullivan, Pashman, Handler and Pollock join in this opinion.

Justice Schreiber has filed a separate concurring and dissenting opinion.

Appendix A

Concurring and Dissenting Opinion of Schreiber, J.

SUPREME COURT OF NEW JERSEY

A-15 September Term 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD JOSEPH RYAN,

Defendant-Appellant.

SCHREIBER, J., concurring in part and dissenting in part.

The Supreme Court opinion in *United States* v. *DiFrancesco*, —— U.S. ——, —— S.Ct. ——, 66 L.Ed.2d 328 (1980), strongly supports the proposition that resentencing a defendant whose probation has been revoked is not inhibited by the Double Jeopardy Clause which protects a person from being "subject for the same offence to be twice put in jeopardy of life or limb." *DiFrancesco* is not on "all fours" with the present case, but it dealt with the same legal principles implicated in this case. *DiFrancesco* involved an increased sentence following an appeal by the government challenging the original sentence as

too lenient. In this case, the increased sentence followed revocation of probation. However, in both cases, the increased sentences were authorized by statute. Defendants in both cases had begun to serve their original prison terms before the increases were imposed. Consequently, the double jeopardy analysis followed by the Supreme Court is entitled to thoughtful consideration in resolving this federal constitutional question.

Writing for the Court in *DiFrancesco,* Justice Blackmun stated that the central objective of the double jeopardy principle was the prohibition against successive trials, as evidenced by the common law roots of the Clause, namely pleas of *autre fois acquit, autre fois convict,* and *pardon.* The pronouncement of sentence, he declared, has never carried the finality that attaches to an acquittal. *Id.* at ——, S.Ct. at ——, 66 L.Ed.2d at 343. Thus in *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d. 656 (1969), the defendant, who successfully obtained a new trial after appeal, could be subjected to a greater sentence than that which had been imposed following the first trial.

Justice Blackmun then explained:

> The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause. *Thus, there is no double jeopardy protection against revocation of probation and the imposition of imprisonment.* See,

e.g., Thomas v. United States, 327 F2d 795 (CA10), cert. denied, 377 US 1000, 12 L Ed 2d 1051, 84 S Ct 1936 (1964). There are other situations where probation or parole may be revoked and sentence of imprisonment imposed. [citations omitted] While these criminal sanctions do not involve the increase of a final sentence, and while the defendant is aware at the original sentencing that a term of imprisonment later may be imposed, the situation before us is different in no critical respect. Respondent was similarly aware that a dangerous special offender sentence is subject to increase on appeal. His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked. [—— U.S. at ——, —— S.Ct. at ——, 66 L.Ed.2d at 346; emphasis supplied][1]

According to Justice Blackmun, the dictum found in *United States* v. *Benz*, 282 U.S. 304, 307, 51 S.Ct. 113 ——, 75 L.Ed. 354, 356-357 (1931), that an increase in sentence

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[1] Contrary to the majority opinion, the *DiFrancesco* court did not specifically leave open the question of whether double jeopardy militated against increasing the sentence of a defendant whose probation was revoked when the probation commenced after some part of the custodial term had been served. See *ante* at —— (slip op. at 10-11). The quotation in footnote 6 of the majority opinion, *ante* at —— (slip op. at 11), refers to a situation in which the sentencing judge recalls a defendant who is out on bail to correct an erroneous sentence. See, *e.g.*, *United States* v. *DiLorenzo*, 429 F.2d 216, 221 (2 Cir. 1970), *cert.* den. 402 U.S. 950, 91 S.Ct. 1609, 29 L.Ed.2d 120 (1971).

after the defendant had begun service of his sentence violated the double jeopardy guarantee against multiple punishment, had been erroneously derived from *Ex Parte Lange*, 85 U.S. 163, —— S.Ct. ——, 21 L.Ed. 872 (1874) the statute involved authorized imprisonment up to one year *or* a fine. After the defendant paid the fine, the trial court resentenced him to a year's imprisonment. The *Lange* Court observed that to impose imprisonment after payment of the fine was to punish twice for the same offense. Justice Blackmun noted that no double jeopardy problem would have existed if the statute had provided punishment of both fine and imprisonment. He limited the *Benz* dictum and the holding in *Lange* "to Lange's specific context." —— U.S. at ——, —— S.Ct. at ——, 66 L.Ed.2d at 347.

Justice Blackmun then concluded:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence. See S Rep No. 91-617, p 97 (1969); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J Crim L & Criminology 19, 32 (1978). [*Ibid.*]

Thus the multiple punishment feature of the Double Jeopardy Clause only prevents the subjection of a defendant to punishment in excess of that prescribed by

the legislature.[2] That this construction accords with the Supreme Court's understanding has recently been confirmed in *Albernaz* v. *United States*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1981) [49 U.S.L.W. 4237 (March 9, 1981)], wherein the Court wrote, albeit in dictum, with respect to the Double Jeopardy Clause:

> Thus the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishment, imposition of such sentences does not violate the Constitution. [*Id.* at ——, —— S.Ct. at ——, —— L.Ed.2d at —— (49 U.S.L.W. at 4240)]

Application of the reasoning and doctrine in *DiFrancesco* to the factual pattern of the instant case indicates the absence of a double jeopardy obstacle. The trial court had the authority to suspend "the imposition or execution of sentence, and also to place the defendant on probation. . . ." N.J.S.A. 2A:168-1. Upon violation of the probation terms, the trial court was empowered to "impose any sentence which might originally have been imposed." N.J.S.A. 2A:168-4. The statutory underpinnings satisfying double jeopardy are self-evident. The authorization for imposition of *any* sentence contemplated an increased sentence over that originally imposed before sentence was suspended. Accordingly, a defendant should not have any expectation of finality in the sen-

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[2] This is not to say that a defendant can be resentenced once the sentence has been served. See *Ex Parte Lange*, 58 U.S. 163, 176, —— S.Ct. ——, ——, 21 L.Ed. 872, 879 (1874).

tence which has been suspended. See *United States* v. *DiFrancesco,* —— U.S. at ——, —— S.Ct. at ——, 66 L.Ed.2d at 347. Thus the defendant could lawfully be sentenced to any term within the statutory maximum, less credit for time served.

The defendant was not subject to a second trial. The suspension of his sentence was at his request. "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott,* 437 U.S. 82, 90, 98 S.Ct. 2187, ——, 57 L.Ed.2d 65, 79 (1978). Increase of the sentence after defendant had commenced serving his sentence did not subject him to multiple punishment. He was entitled to credit for all time previously served and his total period of incarceration would be substantially less than the maximum period for which he could have been imprisoned.

If defendant had been incarcerated pending trial, convicted, given a custodial sentence which was suspended and placed on probation, it is conceded double jeopardy would not prevent a court from imposing a greater sentence upon violation of conditions of probation. *United States* v. *DiFrancesco,* —— U.S. at ——, —— S.Ct. at ——, 66 L.Ed.2d at 346; see *In re White,* 18 N.J. 449 (1955). If defendant had been convicted, sentenced and incarcerated while his appeal was pending, and later obtained a new trial, double jeopardy would not bar the court from imposing a greater sentence after a second conviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). If in these circumstances the sentencing slate is wiped clean, why is it not equally so where the defendant has violated his pro-

bation which had been granted at his request after commencement of his incarceration?

I would hold the Double Jeopardy Clause did not bar defendant's resentencing.

An additional consideration in this case, however, is the legitimate expectation of the defendant in view of what occurred at the time sentence was suspended. The majority opinion has referred to that expectation by calling attention to the standard form of the Monmouth County Probation Department which states:

> If you fail to observe the conditions of your probation you may be returned to court and required to serve your sentence in an institution.

The defendant's signature was affixed to the form beneath a legend that the statement had been read and explained to him. However, at the hearing on the motion to suspend the sentence, the trial court made no reference to the consequences of defendant's failure to adhere to the probation terms. Moreover, during the hearing on violation of probation, defendant argued that the sentence could not legally exceed the custodial term originally fixed. Accordingly, it may well have been defendant's expectation that his custodial sentence would remain the same because of the statement in the form. If upon resentencing the trial court had found that was a reasonable expectation, foreclosing imposition of a longer sentence would have been warranted as a matter of fundamental fairness or due process. *Cf. State* v. *Taylor*, 80 N.J. 353, 364 (1979) (validity of plea bargain depended on "defendant's reasonable expectations drawn from the terms of the bargain"). I would remand the

matter to the trial court for a factual determination on this issue.

I fully agree with and join in the majority opinion with respect to the disallowance of sentence credit for time spent on probation and the applicability of N.J.S.A. 2A: 168-4.

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD JOSEPH RYAN,

Defendant-Appellant.

Argued October 29, 1979—Decided December 4, 1979.

Before Judges Bischoff, Botter and Dwyer.

Susan Slovak, Assistant Deputy Public Defender, argued the cause for appellant (*Stanley C. Van Ness*, Public Defender; *Diana Johnston*, Assistant Deputy Public Defender, of counsel and on the brief).

Rocky L. Peterson, Deputy Attorney General, argued the cause for respondent (*John J. Degnan*, Attorney General; *Edwin H. Stern*, Deputy Attorney General, and *Rocky L.*

Peterson, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

Botter, J. A. D.

This appeal concerns a defendant who served part of a State Prison sentence before being released on probation for drug treatment pursuant to R.3:21-10(b). Defendant thereafter violated probation. The issues are (1) whether the trial judge could properly sentence or resentence defendant after the probation violation to a greater sentence than defendant was serving when he was placed on probation and (2) whether defendant is entitled to credit for time spent on probation. *State* v. *Cunningham*, 143 N.J. Super. 415 (App. Div. 1976), with which we agree, upheld a higher sentence imposed after violation of probation in similar circumstances. However, *State* v. *Williams*, 167 N.J.Super. 203 (App.Div. 1979), certif. granted 81 N.J. 272 (1979), held that a defendant who was released on probation after serving part of his sentence has a constitutional right to credit against his remaining prison term for time spent on probation. We reach a different result as to this issue in the case at hand.

The beginnings of this case are found in the guilty pleas entered by defendant to two indictments and one accusation charging him with five counts of breaking and entering with intent to steal and three counts of larceny. In addition, defendant pleaded guilty to the disorderly persons offense of stealing charged in a municipal complaint. As a result, on January 4, 1974 defendant was sentenced to State Prison for concurrent terms, the longest being three to five years. A concurrent six-month term in the

Monmouth County Correctional Institution was imposed for the disorderly persons offense. Defendant was given credit for nine days spent in custody. In an unreported opinion we upheld the sentences in an appeal in which defendant urged that they were excessive.

[1, 2] After serving seven months in custody, defendant's motion under R.3:21-10(b) to suspend his sentences was granted as of August 1, 1974, and he was placed on probation and transferred to a drug treatment center where he resided until some time in September 1974. Thereafter, in February 1977 defendant was cited for violating probation. He pleaded guilty to two of the three charges, namely, abscond from probationary supervision and failing to report since January 5, 1976, and changing his residence without permission and leaving the State for more than 24 hours without permission. Sentence was imposed pursuant to N.J.S.A. 2A:168-4. Defendant received various concurrent sentences for terms of five to seven years and two to three years, respectively, for the crimes charged in the indictments and accusation. In addition, he was sentenced to a concurrent term of six months in the Monmouth County Correctional Institute for the disorderly persons offense.[1] Defendant was given credit for 219 days spent in custody.

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[1] Defendant contends that this sentence should be vacated because he had served more than six months in custody before he was released on probation. The State agrees with this contention, and we concur. The six-month term originally imposed for the disorderly persons offense was made concurrent with the sentences to State Prison. Thus, having served and been credited with 219 days in custody when he was transferred to the drug

(Footnote continued on following page)

Appendix B

On this appeal defendant contends that, notwithstanding his violation of probation, the imposition of a higher sentence than that originally imposed after he had begun to serve his prison sentences contravenes the double jeopardy clauses of the United States Constitution and the Constitution of New Jersey. In addition, defendant contends that these sentences were excessive and an abuse of the trial judge's discretion.

[3] Similar double jeopardy claims were considered and rejected in *State* v. *Cunningham,* 143 N.J.Super. 415 (App. Div. 1976), and, as indicated above, we concur in its holding. Suspending a defendant's prison sentence, whether before any part of a custodial sentence has been served, as in *In re White,* 18 N.J. 449 (1955), or after part has been served, as in *State* v. *Cunningham, supra,* and placing a defendant on probation, is done pursuant to legislative authority. As part of the legislative scheme, N.J.S.A. 2A: 168-4 permits the imposition of any sentence that could have been imposed for the underlying crimes after a probation violation has occurred. The court in *In re White,*

(Footnote continued from preceding page)

treatment facility, defendant had completed the sentence for the disorderly persons offense prior to that transfer. No part of that sentence remained to be suspended when defendant was placed on probation. Accordingly, we vacate the sentence imposed for the disorderly persons offense following defendant's violation of probation. This has no practical significance since defendant was given credit for more time spent in custody than the six-month concurrent sentence.

We note, also, that defendant has been released on parole. This does not moot the appeal, however, because the length of defendant's lawful sentence and credit for time served will determine the duration of parole.

supra, spoke of this sentence as a "new" sentence. 18 N.J. at 456. Surely, it is a sentence that replaces the original sentence, so that the original sentence must be viewed as provisional or tentative in nature when it has been suspended in part or in whole and probation imposed. See *Roberts* v. *United States*, 320 U.S. 264, 274, 64 S.Ct. 113, 118, 88 L.Ed. 41, 47 (1943) (Frankfurter, J., dissenting).

[4, 5] In *Roberts, supra*, 320 U.S. at 274-275, 64 S.Ct. at 118-119, 88 L.Ed. at 46-47, Mr. Justice Frankfurter argued that it should make no difference whether the sentencing judge fixes a prison term which is suspended or fixes no term at all and merely suspends all sentencing before placing a defendant on probation. The third variant is the case at hand, where a prison term has been imposed and was partially served before the court, at defendant's request, suspended the balance of the term. In all three situations the legislative scheme attaches the same consequences to a violation: a new sentence can be imposed for the underlying crimes to the limits allowed by law. The probation violation permits a judge to revoke probation and compel execution of the orginial sentence; it also allows the judge to vacate the original sentence and impose any sentence that could have been imposed at the outset. *In re White, supra*, 18 N.J. at 454. When, as here, a defendant moves to suspend the prison term which he is serving and for release on probation, he must be taken to accept the probation laws that he invokes.

[6-12] We recognize the general rule that double jeopardy attaches when a defendant begins serving his sentence, so that he cannot be subjected to multiple punishments for the same offense. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 174, 21 L.Ed. 872, 878 (1874); *North Carolina* v. *Pearce*, 395 U.S. 711, 730-732, 89 S.Ct. 2072, 2091-2092,

23 L.Ed.2d 656, 672-674 (1969). Normally, a sentence which has begun cannot be set aside and a higher sentence imposed. *Id.; State* v. *Matlack,* 49 N.J. 491, 501-502 (1967), *cert.* den. 389 U.S. 1009, 88 S.Ct. 572, 19 L.Ed.2d 606 (1967). However, where on appeal defendant's conviction is reversed and his sentence vacated, defendant can be given a more severe sentence upon reconviction than originally imposed, so long as his subsequent conduct justifies the higher sentence and retaliation for taking an appeal has not motivated the new sentence. *North Carolina* v. *Pearce, supra,* 395 U.S. at 723-726, 89 S.Ct. at 2079-2081, 23 L.Ed.2d at 668-670. By analogy, a sentence imposed after probation has been violated can reflect the added basis for evaluating defendant's amenability to reform, namely, his response to probation. *Roberts* v. *United States, supra,* 320 U.S. at 276, 64 S.Ct. at 119, 88 L.Ed. at 48 (Frankfurter, J., dissenting). That experience may reveal that the sentences originally imposed were too lenient. On the other hand, defendant has it within his power to avoid resentencing and reincarceration by complying with the conditions of probation. We see no reason to condemn this flexibility in sentencing when defendant is given the advantages of probation. It does not permit an arbitrary increase in a sentence unrelated to a defendant's subsequent conduct. See *Roberts* v. *United States, supra,* where three justices, dissenting on a different issue (the interpretation of the federal Probation Act), opined that there was no constitutional bar to increasing a suspended sentence after probation has been violated; but the majority of the court did not reach this issue. Double jeopardy concepts should not condemn the imposition of a new sentence in place of the suspended sentence as part of a state's sentencing plan when a defendant violates conditions of probation imposed on his release from prison. Of course, defendant must be

given credit for time served against the new sentence. *North Carolina* v. *Pearce, supra,* 395 U.S. at 718, 89 S.Ct. at 2077, 23 L.Ed.2d at 665.

Apart from the constitutional issue, defendant contends that R.3:21-10(b) was not intended to authorize an increase in sentence under any circumstances. Defendant cites *State* v. *Matlack,* 49 N.J. 491 (1967), *cert.* den. 389 U.S. 1009, 88 S.Ct. 572, 19 L.Ed.2d 606 (1967), in support, as well as a general comment to this effect in the Report of the New Jersey Supreme Court's Committee on Criminal Practice, 98 N.J.L.J. 321, 343 (1975). However, these references are not pertinent. The Committee on Criminal Practice cited *Matlack* for the proposition that R. 3:21-10 was not intended to authorize an increase in sentence as part of a sentence modification "unless the original sentence is the result of a mistake of a clerical nature." 98 N.J.L.J. at 343. The *Matlack* court did not address itself to a suspension of sentence and imposition of probation; it was not concerned with sentencing under N.J.S.A. 2A:168-4 for a violation of probation. In *Matlack* the trial judge had imposed a sentence of 2 to 3 years for robbery and 10 to 15 years for atrocious assault and battery, clearly in excess of the authorized seven year maximum. The trial judge indicated that the sentence for robbery was "mistakenly made under the Atrocious Assault and Battery indictment and the sentence should be corrected." 49 N.J. at 494. The Supreme Court held that a sentence imposed cannot be increased except where a clerical error does not reflect the true sentence intended by the trial judge. If the trial judge in *Matlack* intended the longer sentence for the atrocious assault and battery, erroneously thinking it was a more serious offense than robbery, he could not increase the

robbery sentence merely because the other illegal sentence had to be reduced. 49 N.J. at 502. Obviously, a probation violation was not involved.

Defendant also contends that N.J.S.A. 2A:168-1 and N.J.S.A. 2A:168-4 do not apply when service of a State Prison sentence is interrupted by a resentencing under R.3:21-10(b). Defendant suggests that suspension of a sentence and imposition of probation may be made under the inherent power of the court independent of N.J.S.A. 2A:168-1 *et seq.* We disagree. N.J.S.A. 2A:164-17 deals with sentences to State Prison. It provides: "Nothing contained in this section shall be construed to repeal or affect the power of the courts to suspend the imposition or execution of sentence and place the offender on probation." N.J.S.A. 2A:168-1, which preceded the enactment of N.J.S.A. 2A:164-17, authorizes a court "to suspend the imposition or execution of sentence, and also to place the defendant on probation . . ." The court in *Adamo* v. *McCorkle,* 13 N.J. 561, 566 (1953), *cert.* den., 347 U.S. 928, 74 S.Ct. 531, 98 L.Ed. 1080 (1954), reviewed the history of probation in New Jersey and concluded that "the abundant coverage" of the Probation Act, now found in N.J.S.A. 2A:168-1 *et seq.,* made it unnecessary and not useful to refer to cases which preceded the adoption of that act.

[13] We see no reason to resort to our inherent power to suspend sentences when N.J.S.A. 2A:168-1 is broad enough to allow the suspension of a partially executed sentence so that a defendant can be placed on probation. It follows, therefore, as we held in *State* v. *Cunningham, supra,* that N.J.S.A. 2A:168-4 applies to a violation of probation imposed with the suspension of a sentence pursuant to R.3:21-10(b).

Appendix B

[14] Nor do we find persuasive defendant's reference to N.J.S.A. 2A:164-16 and the holding of *State* v. *McCue*, 148 N.J.Super. 425 (App.Div.1977). *State* v. *McCue* involved a split sentence to a county institution, with probation imposed pursuant to N.J.S.A. 2A:164-16. By a split sentence we mean one in which a designated portion is ordered served in jail and the balance suspended, with defendant placed on probation. N.J.S.A. 2A:164-16 authorizes such a sentence, but it applies only to sentences to a county jail, penitentiary or workhouse. It also limits resentencing for a probation violation to "the remaining portion of the sentence originally pronounced," in contrast to the imposition of a new sentence as authorized by N.J.S.A. 2A:168-4. N.J.S.A. 2A:164-16 contrasts with N.J.S.A. 2A:164-17, which governs State Prison sentences. *State* v. *McCue, supra*, recognizes that N.J.S.A. 2A:164-17 does not authorize split sentences to State Prison. While release under R.3:21-10(b) transforms a State Prison sentence into something resembling a split sentence, it affords no basis for limiting the sentence that can be imposed for a probation violation by analogy to the legislative prescription in N.J.S.A. 2A:164-16.

[15] Thus, as in *State* v. *Cunningham*, we conclude that a court has the full authority granted by N.J.S.A. 2A:168-4 in sentencing a probation violator who was released from State Prison pursuant to R.3:21-10(b). In such a case, neither double jeopardy principles nor statutory limitations prevent a judge from sentencing a probation violator to any sentence that could have been imposed for the original underlying offense or offenses.

[16] Defendant also contends that the trial judge erred in not allowing him credit against the new sentences for time served while on probation, in addition to time served

in jail, in keeping with the holding of *State* v. *Williams, supra.*[2] In *Williams* the court reasoned that probation is "a form of punishment." 167 N.J.Super. at 207. *In re Buehrer,* 50 N.J. 501, 509 (1967), was quoted to show that probation has "sting" and that restrictions on the probationer are "punitive in quality." Thus, our colleagues in *Williams* concluded that in the circumstances of that case, compelling a defendant to serve his full sentence without credit for time spent on probation constitutes "multiple punishments for the same offense," interdicted by the double jeopardy clause of the Fifth Amendment. 167 N.J.Super. at 208. *North Carolina* v. *Pearce, supra,* was cited in support of that holding.

There is a factual distinction between *Williams* and the case at hand which may or may not be significant. In *Williams,* defendant was ordered released from prison pursuant to R.3:21-10 and placed on probation with drug-treatment conditions. The State appealed this order without seeking a stay, and, while defendant was on probation it was reversed as an abuse of the trial judge's discretion. Defendant was remanded to serve his prison term. The court held that "refusing defendant credit for the probationary period served . . . would be to impermissibly increase his sentence previously imposed . . . ." 167 N.J.Super. at 208.

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[2] Even if defendant were entitled to credit for time served on probation, it would not include the time during which he absconded "while under supervision" and failed to report, since "the time during which [a probationer] remains away or hidden shall not be counted as part of his term of probation." N.J.S.A. 2A:168-1. Moreover, we would also have to contend with the fact that defendant violated probation in other respects, though not formally charged with such violation.

Appendix B

The court in *Williams* may have thought it unfair that defendant's full sentence was to be extended by the several years he spent on probation without wrongdoing on his part, and without violating probation. In those circumstances it treated probation as a form of punishment for which credit was allowed against defendant's maximum sentence.

[17] We question whether *North Carolina* v. *Pearce, supra*, compels the result reached in *Williams*. *North Carolina* v. *Pearce* did not involve credit for time spent on probation before or during a custodial term. *Pearce* involved a sentence imposed after the retrial of a defendant who had served part of his jail sentence under a conviction that was reversed on appeal. As noted above, *Pearce* held that on resentencing a defendant must be given full credit for time served under his original sentence, but that an increase in sentence may be imposed. Probation was not involved.

N.J.S.A. 2A:168-2 provides that conditions of probation may include reporting to a probation officer, restricting a change in residence, avoiding undesirable associations, and such other requirements as the court determines. In the case at hand defendant's release from prison was conditioned on his participation as a resident in a drug treatment center until "properly discharged by the authorities thereof and with the approval of the Monmouth County Probation Department. . . ." The primary goal must have been rehabilitation since defendant was released from prison. Probation has been termed "a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." *Burns* v. *United States*, 287 U.S. 216, 220, 53 S.Ct.

154, 155, 77 L.Ed. 266, 268 (1932); *Adamo* v. *McCorkle, supra,* 13 N.J. at 563. The court in *In re Buehrer, supra,* while speaking of probation as "involving punishment," also said: "Probation assumes the offender can be rehabilitated without serving the suspended jail sentence." 50 N.J. at 509. Nevertheless, however mild the restrictions on a probationer's liberty, probation may be viewed in some cases as essentially punitive in nature. Whatever the object, probation may be given one effect in one case and another effect in others. For example, in *United States* v. *Rosenstreich,* 204 F.2d 321 (2 Cir. 1953), probation was viewed as punitive for the purpose of determining when defendant commenced serving his sentence.

[18] We hesitate to allow the labels applied to the goals of probation—punishment, deterrence, rehabilitation—to determine the result in this case. It is preferable to look at the burdens of probation to determine the issue involved. Despite some restrictions on a probationer's movements, the probationer's condition, like a parolee's, is "very different from that of confinement in a prison." *Morrissey* v. *Brewer,* 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed. 2d 484, 495 (1972). In our view, "street time" spent by a defendant on probation cannot be equated with prison time. The probationer is free to move about, with some restrictions; he is encouraged to become and remain employed, N.J.S.A. 2A:168-2; and his reporting duties and other obligations are normally not so burdensome as to compare with incarceration. (A different view may be taken of time spent in a custodial setting, such as in a residential treatment institution, but we will deal with that later.) Clearly, the Legislature has not equated probation and prison time. In authorizing a custodial sentence after probation has been violated, the Legislature contemplated

that a maximum custodial sentence could be imposed. N.J.S.A. 2A:164-4. The statutory scheme does not mandate credit for time spent on probation. *Id.*; see also N.J.S.A. 2A:164-16, discussed above; *cf.* R.3:21-8; *State* v. *Smeen,* 147 N.J.Super. 229 (App.Div.), certif. den. 74 N.J. 263 (1977).

[19] We conclude that defendant cannot demand credit for probation time as a matter of right. This is the prevailing view. *Hall* v. *Bostic,* 529 F.2d 990, 991 (4 Cir. 1975), *cert.* den. 425 U.S. 954, 96 S.Ct. 1733, 48 L.Ed.2d 199 (1976); *Thomas* v. *United States,* 327 F.2d 795 (10 Cir. 1964), *cert.* den. 377 U.S. 1000, 84 S.Ct. 1936, 12 L.Ed. 2d 1051 (1964); *United States* v. *Guzzi,* 275 F.2d 725 (3 Cir. 1960); *Kaplan* v. *Hecht,* 24 F.2d 664, 665 (2 Cir. 1928); *Gehl* v. *People,* 161 Colo. 535, 537, 423 P.2d 332, 334 (Sup. Ct.1967); *State* v. *Lowdermilk,* 245 Ind. 93, 98, 195 N.E.2d 476, 479 (Sup.Ct.1964); *State* v. *Young,* 273 Minn. 240, 245-249, 141 N.W.2d 15, 19-20 (Sup.Ct.1966); *Van Dorn* v. *Warden, Nevada State Prison, Nev.,* 569 P.2d 938 (Sup. Ct.1977); *see State* v. *Phillips,* 443 S.W.2d 139 (Mo.Sup. Ct.1969). In some cases where credit for probation time has been allowed the result was dictated by statute. *People* v. *Stewart,* 61 Ill.App.3d 111, 114, 18 Ill.Dec. 476, 479, 377 N.E.2d 1112, 1115 (Ct.App. 1978); *State* v. *Murray,* 81 N.M. 445, 447, 468 P.2d 416, 419 (Ct.App.1970).

We had referred to defendant's residential status in a drug treatment center, Patrick House, in Jersey City. Defendant did not expressly contend that the time spent there should be considered separately in determining whether probation should be equated with prison time for credit purposes. On the record before us, however, we are unable to determine the extent to which defendant's liberty had been restrained during the two months or so that he

spent there. The record indicates that he was on a methadone program, but tells us nothing more. Accordingly, in denying credit for probation time we do so without prejudice to defendant's right to move in the trial court for credit limited to the time he spent at Patrick House. See *State* v. *Smeen, supra.* We doubt that a sufficient showing can be made to annul on constitutional grounds a statutory scheme which does not allow for such credit. Out of caution, however, we prefer to leave the issue open until a record is made and the contention is specifically advanced in this or any other case.

Lastly, we consider defendant's contention that after his conviction for violating probation, the sentence imposed was excessive and an abuse of discretion.

[20] As background we note that defendant, born in July 1950, has a history as a juvenile and adult offender, with two previous indeterminate sentences to the Youth Correctional Institution Complex. His criminal conduct continued while on parole from that institution. He asserted that the property crimes in this case were committed to support his addiction to heroin.

We are primarily interested in his behavior after he was released from prison on August 1, 1974 and placed on probation. First defendant spent two months or less in Patrick House. (He claimed at the probation violation hearing that he successfully ended his use of methadone as well as heroin.) In June 1975 he was charged with growing marijuana in a field in Highlands, New Jersey.[3]

[3] The court below disregarded this charge, as we do, because defendant's conviction was ultimately reversed by us for inadequate proof of the test made of the vegetation defendant and a friend were seen tending.

That same month he was arrested in Seaside Heights for possession of stolen property and larceny. Defendant continued to report to the probation department until January 5, 1976, when he made his last visit and advised that his conviction for the disorderly persons marijuana offense was being appealed.

In February 1977 defendant was committed for 30 days for malicious damage and larceny. By then there were five or six detainers lodged against him by New Jersey and New York authorities. These included charges on two counts of burglary, one of possession of stolen property and one of jewelry theft in May 1976 in New York, a disorderly persons offense of contributing to the delinquency of a minor in May 1976, two contempt of court offenses, one of which was for failing to pay a fine, and larceny of a motor vehicle in October 1976 in Ocean County. The New York authorities had initiated extradition proceedings against defendant. It appears that defendant had entered guilty pleas to the malicious damage charge and one of the contempt of court charges.

Defendant had served only seven months in jail for the underlying serious crimes before he was released on probation. Considerable leniency was accorded him; but he was unfaithful to the obligations of probation. We cannot say that the trial judge abused his discretion in the sentences imposed. *See State* v. *Whitaker,* 79 N.J. 503, 512-517 (1979); *State* v. *Knight,* 72 N.J. 193 (1976).

Affirmed.

APPENDIX C

Order of the Supreme Court of New Jersey Granting Stay of the Judgment

SUPREME COURT OF NEW JERSEY

M-1043 September Term 1980

(Filed—May 20, 1981)

STATE OF NEW JERSEY,

Plaintiff-Movant,

v.

EDWARD JOSEPH RYAN,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for stay of the judgment of this Court is granted pending disposition of a timely petition to the United States Supreme Court for a writ of *certiorari*.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of May, 1981.

STEPHEN W. TOWNSEND
Clerk